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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/081,575 | 02/22/2002 | Robert Stanley Farr | F6146(C) | 1985 |

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EXAMINER

MADSEN, ROBERT A

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| ART UNIT | PAPER NUMBER |
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1761

DATE MAILED: 06/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/081,575

Applicant(s)

FARR ET AL.

Examiner

Robert Madsen

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 May 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on 23 May 2005. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Attached. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☒ Applicant's reply has overcome the following rejection(s): Claims 1-4 rejected under 35 USC 112, first paragraph, and Obviousness-type Double Patenting.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: none.

Claim(s) objected to: none.

Claim(s) rejected: 1-14.

Claim(s) withdrawn from consideration: 15-21

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Attached.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____

13. ☐ Other: _____

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1. An appeal under 37 CFR 1.191 was filed in this application on May 23, 2005. Appellant's brief is due on July 23, 2005 in accordance with 37 CFR 1.192(a).
2. The amendment filed May 23, 2005 under 37 CFR 1.116 in reply to the final rejection will be entered upon the filing of an appeal, but is not deemed to place the application in condition for allowance. Upon the filing of an appeal and entry of the amendment, the status of the claims would be as follows:

Allowed claim(s): none

Rejected claim(s): 1-14

Claim(s) objected to: none

Response to Arguments

3. The obvious type double patenting rejection with respect to application 10/081,481 was withdrawn in light of the terminal disclaimer filed August 3, 2004.
4. Applicant's arguments with respect to the rejection of claims 1-14 under 35 U.S.C. 112, first paragraph have been fully considered and are persuasive. The rejection has been withdrawn.
5. Applicant's arguments with respect to Ash '841 have been fully considered but they are not persuasive. Applicant contends that Ash does not suggest the method of dispensing is geared toward dispensing directly into the mouth of a consumer and equates drinking from the apparatus of Ash to drinking from a household sink. However, claim 1 is directed to a beverage product, not a method. The product limitation to which applicant refers (i.e. "*suitable to dispense the beverage as an*

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effervescent beverage to a mouth of a consumer") is an *intended* use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is *capable of* performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963). In the instant case, Ash teaches the recited product limitations (in the areas cited in the Office Action mailed March 3, 2004).

Additionally, Ash is *capable of* performing the intended use for the reasons stated in the Arguments of the Office Action mailed February 23, 2005 : it was notoriously well known that faucets in a household sink and a beer tap have been used to dispense water or beer into the mouth of a consumer. Therefore, Ash meets the *intended* use limitation and anticipates the claim.

6. Regarding the expression "smooth and silky", both "smooth" and "silky" are relative terms, and MPEP 2173.05(b) states "Acceptability of the claim language depends on whether one of ordinary skill in the art would understand what is claimed, in light of the specification". As stated in the Office Action mailed March 3, 2004, the specification does not define "smooth and silky" per se, but includes the statement "not smooth and silky (e.g. when carbon dioxide is the sole gas employed)". The rejection was based on the fact that Ash teaches the gas comprises both nitrogen and carbon

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dioxide (i.e. carbon dioxide is not the sole gas employed). Thus, in light of the specification, it appears that the composition of Ash is smooth and silky.

7. Applicant's arguments with respect to de la Guardia '254, have been fully considered but they are not persuasive. Applicant contends that de la Guardia does not teach the pressurized container is suitable to be dispensed as an effervescent beverage into the mouth of a consumer. As discussed above with respect to Ash, this limitation is an intended use. De la Guardia meets the structural limitations. The pressurized beverage product of de la Guardia would be capable of dispensing into a consumer's mouth, because de la Guardia teaches the containers are 2 or 3 liter carbonated beverage, which were known to be suitable to dispense a beverage as an effervescent beverage to the mouth of a consumer. It is further noted that de la Guardia utilizes the valve for dispensing and the valve, shown in Figure 4, has a similarly sized outlet as the bottle outlet. Thus, there is nothing in de la Guardia to that would teach away from dispensing into a consumer's mouth.


8. Regarding the expression "smooth and silky", both "smooth" and "silky" are relative terms, as discussed above with respect to Ash. The rejection was based on the fact that de la Guardia teaches a carbonated beverage in a container, wherein the head space is pressurized by air. As a result, air, which is sparingly soluble, is dispersed within the beverage. Air comprises 78% nitrogen, 20% oxygen and less than 2% argon. Consequently, the beverage comprises nitrogen, oxygen, and carbon dioxide, and carbon dioxide is not the sole gas employed. Thus, in light of the specification, it appears that the composition of de la Guardia is smooth and silky.

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9. Regarding claim 6, the arguments presented address the limitations of the claim 1. The rejection is proper for reasons discussed in paragraph 6 above and the reasons stated in the Office Action mailed February 23, 2005.
10. Regarding claims 7 and 8, the arguments presented address the limitations of the claim 1. The rejection is proper for reasons discussed in paragraph 6 above and the reasons stated in the Office Action mailed February 23, 2005.
11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.
12. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.
13. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen 
Examiner
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